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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 586

ROMEO TRUJILLO-M,

Petitioner,

v.

THE BANK OF NOVA SCOTIA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The decision of the Supreme Court, New York County, is reported at 51 Misc. 2d 689, 273 N.Y.S. 2d 700 and is set forth at pages 1a-6a of the Appendix to the Appendix to the Petition.* The decision was unanimously affirmed without opinion by the Appellate Division of the Supreme Court, First Department, in an order reported

* Except as otherwise noted, figures in parentheses refer to pages of the Appendix and Supplemental Appendix to the Petition.

at 289 N.Y.S. 2d 389. The Appellate Division and the Court of Appeals of the State of New York denied motions for a further appeal to the Court of Appeals. The orders on these two motions are not reported; the Order and Judgment of the Appellate Division are set forth at pages 9a-12a of the Supplemental Appendix to the Petition; the order of the Court of Appeals is set forth on page 7a of the Appendix to the Petition.

Questions Presented

For the reasons hereafter set forth in the Argument, respondent believes and respectfully submits that the petition presents no questions appropriate for review by this Court.

Statement

Petitioner's Statement of the Case (Petition pages 5-7) repeats factual contentions that are inconsistent with the record and the facts found by the Supreme Court of New York. The New York Supreme Court found the following facts to be undisputed.

Petitioner, a citizen of the Dominican Republic, residing in Florida, brought suit in the Supreme Court of the State of New York against respondent, a Canadian banking corporation, to recover the sum of $1,737,255 with interest. Respondent is licensed to do business in New York and also maintains a branch office in the Dominican Republic. While a citizen and resident of the Dominican Republic, petitioner opened an account with respondent's branch in that country. The account was in pesos, the currency of the Dominican Republic, and was established, maintained, and operated under, in accordance with, and subject to the laws of the Dominican Republic.

Petitioner is the brother of the late Rafael Trujillo Molina, quondam dictator of the Dominican Republic.

Following the overthrow of the Trujillo regime in the latter part of 1961, the Superintendent of Banks of the Dominican Republic ordered the respondent's Dominican branch to "freeze the funds and securities belonging, without any exception, to the members of the Trujillo family", including the petitioner, and thereafter, pursuant to Dominican law authorized by amendment of the Dominican Constitution, the property of the petitioner (including the bank account in question) was confiscated and the respondent's Dominican branch was directed to and did pay over to the Dominican national treasury the balance then standing to the credit of petitioner's account with respondent's said branch in the Dominican Republic.

The New York Supreme Court held that the confiscation of petitioner's account with respondent's Dominican branch was an act of state executed by the Dominican Republic within its own territory that, under Dominican law, extinguished respondent's liability to petitioner for that account. The Supreme Court of New York further held that the so-called "Sabbatino Amendment" to the Foreign Assistance Act of 1964 did not prevent respondent from using the act of state doctrine as a defense to multiple liability upon a deposit that had been taken over by a foreign state (6a). Accordingly, on the basis of Section 204-a (3)(a) of the New York Banking Law and decisional precedents, the New York court dismissed the causes of action alleged by the petitioner and granted summary judgment in favor of the respondent This determination was unanimously affirmed without opinion by the Appellate Division of the Supreme Court of New York and leave to appeal to the New York Court of Appeals was denied by the Appellate Division and by the Court of Appeals on separate applications.

ARGUMENT

I.

The validity of section 204-a (3)(a) of the New York Banking Law is not drawn in question by the decision of the New York court.

The legal effect of the act of state fully executed by the Dominican government within its territory was to discharge the respondent bank from its liability on the bank account maintained by the petitioner in the Dominican Republic. The decisions of this Court as well as of the highest court of the State of New York thus constrained the New York court to dismiss the action below.

Banco Nacional de Cuba v. *Sabbatino,* 376 U.S. 398 (1963)

Oetjen v. *Central Leather Co.,* 246 U.S. 297 (1918)

Underhill v. *Hernandez,* 168 U. S. 250 (1897)

M. Salimoff & Co v. *Standard Oil Co.,* 262 N.Y. 220, 186 N.E. 679 (1933)

Dougherty v. *Equitable Life Assurance Society,* 266 N.Y. 71, 193 N.E. 897 (1934)

No contrary result is dictated by the Foreign Assistance Act of 1964, as amended (See p. 7 *infra*).

The Supreme Court of New York found that section 204-a(3)(a) of the New York Banking Law restated decisional law in statutory language, saying:

> "Conformably, the liability of the defendant bank is pursuant to Banking Law, section 204-a(3)(a), to be determined by the liability of its Santo

> Domingo branch under Dominican law. Plaintiff fails to demonstrate that such liability was not fully extinguished upon payment to the National Treasury of the Dominican Republic of the credit balance then owed to plaintiff . . ." (5a-6a)

The New York court expressly stated that "Two factors are determinative to wit, New York Banking Law, section 204-a(3)(a) and decisional precedents which require the application of the act of state doctrine" (4a) As the court held that the petitioner had failed to state a cause of action under the controlling decisions of this Court and of the courts of New York, its ruling on the merits cannot be said to depend on Section 204-a(3)(a), and the validity of that State statute is not drawn into question. Petitioner has thus failed to meet the requirements of 28 U.S.C. Section 1257(3) and the petition should be denied.

II.

Section 204-a (3)(a) of the New York Banking Law is a statute of general application that codifies the New York choice of law rules, defines the jurisdiction of New York courts, and is not repugnant to the Constitution, treaties or laws of the United States.

In substance Section 204-a(3)(a) provides that in an action on a contract governed by foreign law, the New York courts will apply the foreign law and will not provide a remedy that is inconsistent with the result prescribed by such governing foreign law. The section thus is in no way repugnant to the constitutional provisions prohibiting the impairment of contracts and guaranteeing equal protection of United States law. These constitu-

tional provisions simply have no application to Section 204-a(3)(a) of the New York Banking Law.

Petitioner, a non-resident of the State of New York, has brought an action against the respondent bank, a Canadian corporation, for alleged breach of a contract made and to be performed in the Dominican Republic, under and in accordance with the laws of the Dominican Republic. Under the New York choice of law rule, the law to be applied by the New York court is that of the Dominican Republic.

Auten v. *Auten*, 308 N.Y. 155, 124 N.E 2d 99 (1954)

Richard v. *American Union Bank*, 241 N. Y. 163, 149 N.E. 338 (1925)

Section 204-a(3)(a) is an explicit statutory statement of New York doctrine and limits the remedial jurisdiction of the New York courts accordingly.

It is apparent that, so far from impairing the obligation of a contract, the section simply states the public policy of New York, namely, that in a suit on a foreign contract the New York courts are not available to provide any remedy other than such, if any, as would be available under the laws of the place where the contract was made and to be performed. The New York court found that respondent was discharged of liability under Dominican law (4a-6a), and so properly dismissed the action. See also: *Zimmerman* v. *Sutherland*, 274 U.S. 253 (1927).

III.

The Foreign Assistance Act has no application to the case at bar.

As indicated above, the decision of the New York court, conformable to section 204-a(3)(a) of the New York Banking Law, and to decisional precedent, was that the New York courts lacked jurisdiction to afford a remedy to the petitioner where the governing law of the contract afforded no such remedy. Quite clearly, the so-called "Sabbatino Amendment" to the Foreign Assistance Act of 1964, neither had nor was intended to have the effect of directing the courts of a State to assume a remedial jurisdiction in contravention of the State's public policy enunciated by the State legislature.

Moreover, the inapplicability of the "Sabbatino Amendment" to the issue between petitioner and respondent was emphatically expressed by the Congress itself. The Committee on Foreign Relations of the United States Senate said:

> ". . . the law does not prevent banks, insurance companies, and other financial institutions from using the act of state doctrine as a defense to multiple liability upon any contract or deposit or insurance policy in any case where such liability has been taken over or expropriated by a foreign state. In such cases, it is not intended to affect any defense previously available to such institution."
>
> (Senate Report #170 on the Foreign Assistance Act of 1965, April 28, 1965, page 19)

Accordingly, neither the New York Banking Law nor the decisional precedents are inconsistent with, or indeed,

affected by the Foreign Assistance Act of 1964, as amended. The petition fails to meet the requirements of 28 U.S.C. Section 1257(3).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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